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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	
Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers	CC Docket No. 97-146

To: The Commission

COMMENTS OF HYPERION TELECOMMUNICATIONS, INC.

Leonard J. Kennedy
Loretta J. Garcia
Christopher D. Libertelli

Its Attorneys

DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 776-2000

August 18, 1997

SUMMARY OF ARGUMENT

The Commission's *Order* in response to Hyperion's Petition for Forbearance represented a significant procompetitive application of the Commission's Section 10 forbearance authority. The Commission should retain its policy of permissive detariffing as it applies to non-dominant providers of interstate exchange access services. The Commission should not go further to impose a policy of mandatory or complete detariffing upon non-dominant providers of interstate exchange access services. The Commission lacks the statutory authority to adopt a policy of complete detariffing. In addition, a policy of complete detariffing would not be in the public interest because it would require CLECs to renegotiate customer contracts and would impose significant administrative costs on the emerging CLEC industry as it expands its service offerings to a broader customer base.

Accordingly, Hyperion supports allowing non-dominant providers of interstate exchange access services to file their tariffs with the Commission, or in the alternative, on carrier websites or through an independent tariff clearinghouse.

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Hyperion Telecommunications, Inc., by its attorneys, hereby submits these Comments in response to the Notice of Proposed Rulemaking in the above-referenced docket.[1/]

I. INTRODUCTION & BACKGROUND

Hyperion is a facilities-based competitive local exchange carrier ("CLEC") subsidiaries and affiliates of which are offering or are preparing to offer service in 12 states. Hyperion is therefore interested in the tariffing requirements imposed on its services.

1/ *See In the Matter of Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, CCB/CPD Nos. 96-3; 96-7; CC Docket No. 97-146; FCC 97-219 (released June 19, 1997) (hereafter *"Order"* or *"Notice"*). Publication of the Commission's Notice of Proposed Rulemaking occurred on July 17, 1997; thus, these comments are timely filed.

The Commission's *Order* in response to Hyperion's Petition for Forbearance represented a significant procompetitive application of the Commission's Section 10 forbearance authority. The extension of the Commission's permissive detariffing policy to non-dominant providers of interstate exchange access services provided necessary regulatory relief. The Commission should not impose mandatory detariffing — a remedy Hyperion did not request — under the guise of regulatory relief. Adopting a policy of mandatory or complete detariffing would not be in the public interest because it would require CLECs to renegotiate customer contracts and impose significant administrative costs on the emerging CLEC industry as it expands its service offerings to a broader customer base. Therefore, Hyperion requests that the Commission retain the permissive detariffing policy adopted in the *Order* and apply it to non-dominant providers of interstate exchange access services and nondominant CLECs.

II. THE COMMISSION SHOULD NOT ADOPT A POLICY OF MANDATORY DETARIFFING FOR CAP OR CLEC INTERSTATE ACCESS SERVICES

A. The Commission's Tentative Conclusion That It Has the Statutory Authority to Adopt Complete Detariffing is in Error

The Commission lacks the statutory authority to adopt complete detariffing. The D.C. Circuit's invalidation of mandatory detariffing in the *Competitive Carrier* proceeding's *Sixth Report & Order* establishes that the Commission has the authority to impose a policy of permissive, not mandatory, detariffing under Section 203 of the Act.[2/]

2/ *See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations*, Notice of Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Further Notice of Proposed Rulemaking, FCC 82-187, 47 Fed. Reg.

Prior to the 1996 Act, the Commission did not have the authority to order mandatory detariffing of interexchange or interstate exchange access services. In the *Second Report* and its *Fourth Report* in the *Competitive Carrier* proceeding, the Commission adopted a policy of "forbearing" from enforcing tariffing requirements against non-dominant carriers and instituted a policy of permissive detariffing. In the Commission's *Sixth Report*, the Commission canceled the tariffs of these forborne non-dominant carriers and *prohibited* them from filing new tariffs, thereby instituting a policy of mandatory detariffing.[3/] In response, courts vacated both sets of Orders on the ground that Section 203 of the Act requires all carriers to file all their rates and that the "modification" authority of Section 203(b) did not allow the Commission to eliminate tariff filing obligations.[4/] Thus, Section 203 of the Act, as interpreted by the courts, precluded the Commission's mandatory detariffing policy.

17,308 (1982); Second Report and Order, 91 FCC 2d 59 (1982) Order on Reconsideration, 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28,292 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d. 554 (1983); *vacated AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied, MCI v. AT&T*, 978 F.2d 727 (D.C. Cir. 1992) *cert. denied MCI v. AT&T*, 509 U.S. 913 (1993); Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 1191 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated MCI v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (collectively "*Competitive Carrier*").

3/ *See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations*, Sixth Report and Order, 99 FCC 2d 1191 (1984).

4/ *MCI v. AT&T*, 114 S.Ct at 2229-31 (invalidating permissive detariffing); *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir 1992) (invalidating permissive detariffing); *MCI v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (invalidating mandatory detariffing).

Section 10 provides that the Commission can impose its detariffing policy only if certain statutory criteria are met.[5/] Section 10 reverses these decisions only to the extent that the Commission has authority to reinstate a policy of permissive detariffing under Section 203 to a particular class of carriers when the Commission makes an explicit finding that filing tariffs is not necessary to serve the purposes of the Act, to protect consumers and is otherwise in the public interest. In passing Section 10, Congress authorized the Commission to allow carriers the option of filing tariffs pursuant to Section 203. Nothing in this section can be read to authorize the Commission to *prohibit* carriers from filing tariffs especially when the carrier who set the process of the Commission's consideration of detariffing in motion has not requested this relief.

5/ Section 10(a) authorizes the Commission to forbear from applying any regulation or provisions of the 1996 Act if it determines that:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.

III. A PERMISSIVE DETARIFFING POLICY IS IN THE PUBLIC INTEREST

A. The Commission's Permissive Detariffing Polices in the Interexchange Market Were Successful and Should Be Applied to the Nondominant Exchange Access Market

Even if the Commission persists in its view that it has the statutory authority to order mandatory detariffing, the Commission could not make the required section 10 showing because mandatory detariffing is not in the public interest. Rather, the Commission's experience with permissive detariffing in the interexchange market strongly argues for a policy of permissive detariffing for nondominant firms in the interstate exchange access market.[6/]

The Commission's only experience with affording non-dominant carriers the ability to provide service on a detariffed basis was gained as a result of its permissive detariffing policies adopted in the Competitive Carrier proceeding.[7/] There is reason to believe that the Commission's detariffing policy assisted in the development of the substantially competitive domestic interexchange market that exists today.[8/] Further, a wide consensus of comments in

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6/ The Commission's authority to order mandatory detariffing is uncertain because the *Order* imposing mandatory detariffing on non-dominant domestic interexchange providers has been stayed by the D.C. Circuit. *See MCI v. FCC*, No. 96-1459 (D.C. Cir. Feb. 13, 1997).

7/ *See Competitive Carrier*, Second Report and Order, 91 FCC 2d 59 (1982) (application of permissive detariffing to resellers); Fourth Report and Order (extension of detariffing to non-dominant IXCs).

8/ *See* Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd. 20730 ¶ 2 (1996) (hereafter *IXC Forbearance Order*) ("the interstate, domestic interexchange market has evolved from a market of fledgling competitors overshadowed by a single dominant service provider to a market characterized by substantial competition.").

the Commission's interexchange forbearance proceeding favor permissive detariffing.[9/] In the *IXC Forbearance Order*, the Commission held that "it was highly unlikely" that carriers lacking market power could successfully charge rates that violate the Communications Act."[10/] The growing amount of competition in the interstate exchange access market requires application of the Commission's detariffing policies that have demonstrated their effectiveness.

Tariffs allow for the rapid and widespread public dissemination of information concerning pricing and thus guard against collusive behavior that could harm consumers. The CLEC market is increasingly competitive and features a growing number of entities providing service, making price coordination extremely unlikely. The Commission should not allow a speculative fear of price signalling to eliminate the significant efficiency gains associated with a policy of permissive detariffing.

B. Mandatory Detariffing Will Require Non-dominant CLECs To Modify Their Business Operations in Ways that Are Contrary to the Public Interest

The Commission should understand that the carriers that will be subject to its mandatory detariffing policy are the carriers primarily responsible for bringing competition to the markets for exchange access and local exchange services. This competition is in the public interest and is the focus of much of the Commission's agenda since passage of the 1996 Act. Hyperion intends to provide a competitive alternative to ILEC exchange access services to interexchange customers, large and mid-size end users and Internet Service Providers. It is

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9/ *See* Comments of Sprint at 7; Comments of AT&T at 13; Comments of MCI at 14; Comments of PacTel at 5; Comments of MFS at 4; Comments of GTE at 7.

10/ *See Order* at ¶ 7.

critically important that Hyperion be able to maintain consistent terms and conditions of service across its customer base and avoid excessive administrative costs that mandatory detariffing fosters. Consistency in terms and conditions allows Hyperion's sales force to focus their efforts on other business concerns. Imposing mandatory detariffing will divert Hyperion's resources away from the individual negotiation of prices — a task that will not provide consumers more choice or lower prices. The difficulty of dealing individually with each customer in an evolving and competitive market makes tariffs essential to Hyperion's business and its ability to meet its business plan. For example, tariffs afford Hyperion consistent liability protections for its services. Imposition of mandatory detariffing will force carriers to incur the significant administrative costs associated with renegotiating service contracts that previously referenced FCC tariffs. Likewise, tariffs allow Hyperion to respond to market forces and customer concerns by changing terms and conditions of service in one document instead of thousands of customer contracts. Thus, the efficiency losses of mandatory detariffing are far outweighed by the benefits associated with the maintenance of tariffs in the market for interstate exchange access services.

Accordingly, the Commission's permissive detariffing policy is the superior alternative. Under a policy of permissive detariffing, a carrier's terms and conditions remain consistent and market forces are allowed to operate to move prices toward competitive levels. If a carrier decides tariffs are burdensome or that they cause unnecessary delay or expense, the carrier can elect not to file; but if a carrier believes tariffs are helpful in providing service, it can elect to

file. In this regard, permissive detariffing is a more deregulatory, market-based alternative than a policy of complete detariffing.

If the Commission persists in pursuing a policy of mandatory detariffing it should allow CLECs to file terms and conditions tariffs, without pricing information. The Commission held that "permissive detariffing would facilitate market entry of new non-ILEC providers of interstate exchange access services by not requiring that they disclose their prices to competitors."[11/] The Commission concluded that this result served the public interest by reducing administrative burdens and promoted competitive market conditions. Hyperion requests that the Commission reaffirm this conclusion and clarify that its mandatory detariffing policy does not preclude a carrier from filing terms and conditions tariffs with the Commission and from incorporating these terms by reference into its customer contracts.

C. A Policy of Mandatory Detariffing Will Place CLECs at a Competitive Disadvantage

The Commission should recognize that CLECs like Hyperion are competing against well-funded BOCs. A policy of mandatory detariffing will disadvantage CLECs because dominant providers of exchange access services (i.e., ILECs) will still file tariffs and be able to contract with their customers on this, more efficient, basis.

Hyperion intends to expand its services to include not only large volume customers but also mid-sized and residential customers. In this regard, Hyperion fully supports Time Warner's request that the Commission apply its permissive detariffing policy to all non-dominant telecommunications carriers. Hyperion is building robust facilities based networks

11/ *Order* at ¶ 27.

that are designed to serve large geographic areas. Entrepreneurial CLECs like Hyperion who are building facilities to serve customers currently held captive by the BOCs should be encouraged, not discouraged, by Commission policies. Ironically, the Commission's detariffing policies will have a greater effect on smaller CLECs than larger carriers and, thus, the Commission's detariffing policies can place CLECs at a significant competitive disadvantage *vis a vis* their well-funded rivals. The issue in this proceeding is fundamentally a resource allocation issue. Hyperion can devote its administrative resources to bringing competition to exchange access services, or it can expend those resources on renegotiating the same deal with hundreds of customers once the Commission cancels Hyperion's tariffs. The competitive disadvantage Hyperion operates under is magnified if dominant LECs can contract with their customers on a tariffed basis. The Commission should not impose the administrative costs of establishing the legal relationships between carriers and their customers on CLECs while ILECs need not incur these costs and have the resources to bear them without harm to their operations.

D. The Commission Can Adopt Permissive Detariffing Without Any Major Changes to the Filed Rate Doctrine

The Commission tentatively concluded that "[c]omplete detariffing could preclude carriers from attempting to use the filed rate doctrine to nullify contractual arrangements, and remove uncertainty about the application of the doctrine to tariffed arrangements that are filed on a permissive basis."[12/] The Commission's present concern about the filed rate doctrine is curious given that the *Order* holds that, while the filed rate doctrine may have generated some

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12/ *See Notice* at ¶ 34.

uncertainty, "we find any adverse effects attributable to such uncertainty are outweighed by the public interest benefits" identified by the Commission's permissive detariffing policy.[13/] The public interests benefits noted in the *Order* apply with equal force in this proceeding. Therefore, the Commission should not allow the filed rate doctrine to frustrate its procompetitive detariffing policies.

To the extent the Commission is still uncomfortable with the perceived uncertainty surrounding the filed rate doctrine, the Commission can go a long way toward eliminating this uncertainty. The FCC should establish that under its permissive detariffing policy, non-dominant carrier tariffs filed with the Commission are presumed to be lawful common carrier offerings. In other words, once a tariff is filed, that tariff controls the terms and conditions and prices of the affected services. The Commission will retain the authority, under Section 203 of the Act and the "Substantial Cause" test to scrutinize tariff revisions when they conflict with customer service contracts. Further, nothing in the application of permissive detariffing precludes the Commission from using the Section 208 complaint process to police unreasonable carrier practices. Accordingly, the filed rate doctrine does not preclude the Commission from adopting a policy of permissive detariffing to non-dominant providers of interstate exchange access services.

IV. THE COMMISSION SHOULD ACCEPT ELECTRONIC FILINGS AS AN ALTERNATIVE TO TRADITIONAL TARIFF FILING METHODS

In the Notice, the Commission requests comment on whether it should require any non-ILEC providers of interstate exchange access service subject to any degree of tariff

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13/ *See Order* at ¶ 30.

forbearance to make rates available to the Commission and to interested parties upon request.[14/]

Hyperion supports making its terms and conditions of service available to the Commission. In conjunction with the FCC's electronic filing initiative, the Commission should allow carriers to file their tariffs electronically, on carrier websites or other systems so that the costs of tariff filing are reduced. Carriers would notify the Commission when they have selected this option as a replacement for filing a tariff with the Commission.

If the Commission is concerned about such a private tariff filing system, the Commission might consider designating an independent third party to function as a collector and administrator of all tariff filings submitted by non-dominant providers of interstate services. Competitors and customers alike would be afforded a centralized location to examine the tariff filings.

V. CONCLUSION

The Commission should continue to apply its permissive detariffing policy to non-dominant providers of interstate exchange access services. A policy of mandatory detariffing will impose significant administrative costs upon Hyperion and will impede Hyperion's ability to bring new services to market at competitive prices. Therefore, Hyperion respectfully requests that the Commission allow non-dominant providers of interstate exchange access

14/ *See Notice* at ¶ 34.

services to file their tariffs with the Commission, or in the alternative, on carrier websites or through an independent tariff clearinghouse.

Respectfully submitted,

HYPERION TELECOMMUNICATIONS, INC.

Christopher J. Rozycki
Director of Regulatory Affairs

Of Counsel

Leonard J. Kennedy
Loretta J. Garcia
Christopher D. Libertelli

DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 776-2000

August 18, 1997

CERTIFICATE OF SERVICE

I, Vicki Lynne Lyttle, a secretary at the law firm of Dow, Lohnes & Albertson, PLLC, do hereby certify that on this 18th day of August, 1997, I caused copies of the foregoing Comments of Hyperion Telecommunications, Inc. to be hand delivered to the following:

Commissioner Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, DC 20554

Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, DC 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, DC 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, DC 20554

Competitive Pricing Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 518
Washington, D.C. 20554

*ITS, Inc.
1231 20th Street, NW
Washington, DC 20036

Vicki Lynne Lyttle
Vicki Lynne Lyttle